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IN THE

Supreme Court of the United States

October Term, 1958.

No. 393

RICHARD DOUGLAS FURNISH, M.D.,

Petitioner and Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,
Attorneys for Petitioner, Richard Douglas Furnish, M.D.

The Myers Legal Press, Los Angeles. Phone MA. 29007.

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THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Richard Douglas Furnish, M. D., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 21, 1958, whereby the judgment dismissing the action brought by petitioner for declaratory relief and injunction in the United States District Court against the Board of Medical Examiners of the State of California to set aside its decision suspending petitioner from the practice of medicine for one year, was affirmed; Petition for Rehearing was denied August 7, 1958. [Tr. of Rec. pp. 60-61.]

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court, dismissing petitioner's action for declaratory relief and injunction, is set forth as Exhibit "A." (The decision is not reported at this time.) A Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit was denied on August 7, 1958. (The order denying rehearing is not reported at this time.)

The opinion of the District Court of Appeal of the State of California affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles dismissing petitioner's Petition for Writ of Mandate on March 20, 1957, is reported in 149 Cal. App. 2d 326, 308 P. 2d 924. The opinion is set forth as Exhibit "B."

The Petition for Rehearing in the District Court of Appeal of the State of California was denied on April 9, 1957. (149 Cal. App. 2d 326, 309 P. 2d 493.)

An application to the District Court of Appeal of the State of California to grant a rehearing on its own motion was denied on April 19, 1957. The opinion denying the application to grant rehearing on the Court's own motion is set forth as Exhibit "C." (149 Cal. App. 2d 326, 309 P. 2d 493.)

The Petition for Hearing in the California Supreme Court was denied on May 15, 1957. (48 A. C. No. 12, Minutes, p. 2.)

The Petition for Writ of Certiorari to the District Court of Appeal of the State of California was duly filed

in the Supreme Court of the United States and was denied on October 14, 1957. (78 S. Ct. 37—Memorandum Decision.)

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered June 21, 1958. The Petition for Rehearing was denied by said Court on August 7, 1958.

The issues presented here were urged in the lower Court.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Questions Presented.

I.

Does the United States District Court have jurisdiction over the subject matter?

II.

Has the State Board of Medical Examiners committed an intrusion into the processes of the Federal Court by attaching a penalty to a federal conviction based on a plea of *nolo contendere*, on which the Federal Court may act?

III.

Does a federal conviction based on a plea of *nolo contendere* carry with it any state civil penalties?

IV.

Is a 1951 amendment allegedly making a conviction of a felony, without moral turpitude, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code an *ex post facto* law where applied to an act committed prior to 1951?

V.

Is a federal conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere*, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code?

VI.

Was it an abuse of discretion to suspend the appellant for one year?

Jurisdiction of United States District Court.

The jurisdiction of the United States District Court to hear petitioner's action for declaratory relief and injunction was invoked under Title 28, United States Code, Sections 1651(a), 2201 and 2283.

Statutes and Constitutional Provisions Involved.

Title 28, United States Code, Section 1651(a), provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28, United States Code, Section 2201, provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, United States Code, Section 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Section 2383 of the California Business and Professions Code, before the 1951 amendment provided:

> "The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

Section 2383 of the California Business and Professions Code, after the 1951 amendment, provides:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty; or dismissing the accusation, information or indictment."

Section 6101 of the California Business and Professions Code, before its amendment, provided:

"Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102.

"The record of conviction shall be conclusive evidence and the clerk of the court in which the conviction is had shall, within thirty days thereafter, transmit a certified copy of the record of conviction to the Supreme Court. The proceedings to disbar or suspend an attorney shall be undertaken by the court upon the receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty is deemed to be a conviction within the meaning of this section."

Section 6101 of the California Business and Professions Code, after its amendment provides:

"Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension.

"In any proceeding, whether under this article or otherwise, to disbar or suspend an attorney on account of such conviction, the record of conviction shall be conclusive evidence of guilt of the crime of which he has been convicted. The clerk of the court in which an attorney is convicted of a crime involving, or appearing from the record of conviction probably to involve, moral turpitude, shall, within 30 days after such conviction, transmit a certified copy of the record of conviction to the Supreme Court. The State Bar of California may procure and transmit such record of conviction to the Supreme Court when the clerk has not done so or when the

conviction was had in a court other than a court of this State.

"The proceedings to disbar or suspend an attorney on account of such conviction shall be undertaken by the Supreme Court, pursuant to the procedure provided in this section and Section 6102, upon the receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty or a conviction after a plea of *nolo contendere* is deemed to be a conviction within the meaning of said section."

Article I, Section 10, of the United States Constitution provides that no state shall "pass any bill of attainder or ex post facto law."

Statement of the Case.

Petitioner filed a complaint in the United States District Court, Southern District of California, Central Division, No. 1305-57-T, against The Board of Medical Examiners of the State of California, seeking declaratory relief and injunction to restrain the Board from suspending the appellant from the practice of medicine in the State of California for one year, and to declare the rights of the petitioner. [Tr. of Rec. pp. 3-17.]

The Honorable Ernest A. Tolin, United States District Judge, issued an order to show cause and temporary restraining order, restraining the Board from suspending the petitioner pending the hearing of the order to show cause. [Tr. of Rec. pp. 17-18.]

On motion of the respondent the District Court ordered the complaint dismissed for lack of jurisdiction. [Tr. of Rec. pp. 19-20; 22-23.]

On motion of the petitioner the District Court restored and granted an injunction during the pendency of an

appeal, enjoining and restraining the Board from enforcing the order suspending the petitioner from practicing medicine and surgery in the State of California. [Tr. of Rec. pp. 20-21.]

An appeal was taken by appellant to the United States Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the judgment of the District Court dismissing appellant's petition for lack of jurisdiction, with instructions to terminate the order restoring the original injunction enjoining and restraining The Board of Medical Examiners of the State of California from enforcing its order of suspension. Appellant's petition for rehearing was denied by the Circuit Court. [Tr. of Rec. pp. 60-61.]

The Circuit Court made an order staying the issuance of the mandate pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant, provided such petition is filed on or before September 22, 1958; and in the event the petition for writ of certiorari is granted the stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Statement of Facts.

Petitioner, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Tr. of Rec. p. 3], was convicted on a plea of *nolo contendere* in the United States District Court for the Southern District of California, Central Division, of two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income taxes for the years 1947 and 1948. [Tr. of Rec. pp. 4-5.]

Federal Judge, Leon Yankwich pronounced the judgment, and at the time of doing so stated:

"This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to unethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. This is a very voluminous file here which has been built up by the many letters sent in, which I have in front of me. Some are of a confidential nature and I will not have them filed, but will return them to the probation officer.

"I think the man's past life is not such that probation would be necessary. I think a substantial fine will serve the ends of justice in this particular case, and allow this man to go on: I think, on a plea of nolo contendere they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of nolo contendere does not carry with it any of the civil penalties." [Tr. of Rec. pp. 5-6]

Thereafter The Board of Medical Examiners of the State of California on or about November 10, 1955, made

an order directing that petitioner be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order was based on the convictions on the pleas of *nolo contendere* hereinabove referred to. [Tr. of Rec. pp. 3-4.]

That the order of suspension was made after the Board's Hearing Officer proposed that a suspension of one year be stayed, and petitioner placed on probation for a period of three years. The recommendation of the Hearing Officer was overruled by the Board. [Tr. of Rec. p. 4.]

That at the time the offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the California Business and Professions Code provided as follows:

> "Sec. 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct." [Tr. of Rec. p. 9.]

That said Section 2383 of the California Business and Professions Code was amended in 1951 to read as follows:

> "Sec. 2383. Conviction of felony or offense involving moral turpitude; record as evidence; What deemed conviction; Authority of Board after order under Pen. C. Sec. 1203.4. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment." [Tr. of Rec. p. 8.]

That petitioner entered his pleas of *nolo contendere* to said income tax charges after Section 2383 of the California Business and Professions Code was amended.

That the substantial changes in Section 2383 as enacted in 1951, insofar as they relate to the petitioner are:

That after the words, "the conviction of a felony" a comma was inserted, so that the statute, as amended in 1951, read:

"The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter * * *"

And there was added:

"A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section * * *" [Tr. of Rec. p. 9.]

That the petitioner exhausted all of his remedies available to him in the State Courts of California, and certiorari was denied by the United States Supreme Court when petitioner sought to review the decision of the State Court dismissing petitioner's petition for writ of mandate to set aside the decision of The Board of Medical Examiners. [Tr. of Rec. pp. 12-13.]

The Board of Medical Examiners has stipulated that it did not seek to discipline the petitioner for the conviction of an offense involving moral turpitude. [Stip.]

ARGUMENT.

I.

The United States District Court Has Jurisdiction Over the Subject Matter.

Section 1651, Title 28, *United States Code*, provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . ."

Section 2201, Title 28, *United States Code*, provides:

> "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

Section 2283, Title 28, *United States Code*, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court EXCEPT as expressly authorized by Act of Congress, OR WHERE NECESSARY IN AID OF ITS JURISDICTION OR TO PROTECT OR EFFECTUATE ITS JUDGMENTS." (Emphasis added.)

The instant action seeks to declare the rights of the petitioner and to restrain an administrative State Board; it does not seek to restrain a State court primarily. Therefore, the instant action does not come within the prohibition preventing a Federal court from granting injunctive relief.

A Federal court is not prohibited from restraining and enjoining conduct of administrative proceedings before State bodies or by State bodies.

City of Fresno v. Edmonston, 131 Fed. Supp. 421, 424, 425 (D. C. Cal., 1955).

A Federal Court may restrain State Commissions which are not courts.

Louisiana Railroad Commission v. Texas, etc. R. R. Co., 144 Fed. 68, 72.

In any event, the Federal court under Section 2283 of Title 28, *United States Code*, can act to protect or effectuate its judgments.

The Federal court had authority to enjoin filing or prosecution of action in State courts by a City and its Board of Commissioners, and grant relief prayed for if circumstances were found to so justify.

Browder v. City of Montgomery, 146 Fed. Supp. 127, 129 (D. C. Ala., 1956).

An injunction may be issued by a Federal court to restrain State proceeding seeking to interfere with property in the custody of the Federal Court.

O. D. Jennings & Co. v. Butterbaugh, 89 Fed. Supp. 553, 556 (D. C. Pa.).

In the instant case, we do not have property in the custody of the Federal Court, but we do have a petitioner

who entered a plea of *nolo contendere* in a Federal action, and was subjected to the jurisdiction of the Federal Court.

The United States District Court had authority to stay proceedings in a State Court in aid of its jurisdiction and to protect and effectuate its judgment in a bankruptcy case.

R. F. C. v. Jacksonville Blow Pipe Co., 244 F. 2d 394, 398.

A Federal court can exercise jurisdiction to prevent the trial of a defendant by a State court where the trial would invade constitutional rights, and such jurisdiction can be exercised by way of injunction.

Keegan v. State of New Jersey, 42 Fed. Supp. 922, 924 (D. C. N. J., 1941).

Petitioner's case is one involving a controversy over his rights under a plea of *nolo contendere* in a Federal action; the State Board of Medical Examiners and the California State statute seek to use the *nolo contendere* plea in a State proceeding, which is separate and distinct from the Federal criminal action where the *nolo* plea was entered.

Petitioner is not seeking to have the Federal court relitigate the litigation of the State courts. He does seek to determine whether the Federal court can enjoin an administrative State body from using a *nolo* plea for the purpose of suspending a medical doctor from the practice of medicine.

It should be noted that the action involving the petitioner in the Federal court preceded the action taken by the State Board.

It is respectfully submitted that this is a case where the Federal court has jurisdiction to decide the action on its merits and to determine if the circumstances are such as to justify enjoining the State Board of Medical Examiners from suspending the petitioner from the practice of medicine. To hold otherwise would mean that a *nolo* plea does carry civil penalties and that a State statute may so provide.

II.

The State Board of Medical Examiners Committed an Intrusion Into the Processes of the Federal Court by Attaching a Penalty to a Federal Conviction Based on a Plea of Nolo Contendere, on Which the Federal Court May Act.

The Federal Court in passing judgment on the petitioner at the time his criminal income tax case was disposed of found that his license should not be revoked for the particular offense: it also found that the plea of *nolo contendere* did not carry any civil penalties. [Tr. of Rec. p. 6.] The Court could not have used a stronger language in endeavoring to protect petitioner's right to practice medicine.

Notwithstanding this action by the Federal Court, the State Board of Medical Examiners suspended the petitioner's license to practice medicine because of the convictions based on the pleas of *nolo contendere*.

It is the generally accepted rule that every Court has inherent power to enforce its judgments and decrees.

Florida Guaranteed Securities v. McAllister, 47 F. 2d 762.

The Court may make such orders and issue such process as may be necessary to render the Court's judg-

ments and decrees effective, and this power is not affected by the fact that the decree is final.

Security Trust & Savings Bank v. Southern Pacific, 6 Cal. App. 2d 581, 45 P. 2d 268, 270.

The power to enforce their decrees is necessarily incident to the jurisdiction of Courts.

Commonwealth v. Lewis, 253 Pa. 171.

The Federal Court may stay proceedings in a State tribunal where necessary to protect or effectuate its judgment.

28 *U. S. C.,* Sec. 2283.

Where the defendant had pursued and exhausted his state remedies, resort to the Federal District Court was appropriate.

United States of America ex rel. Oliver S. Smith v. J. Vernal Jackson, 234 F. 2d 742, 750 (C. C. A. 2d).

An interlocutory injunction or temporary restraining order is preliminary to a hearing on the merits, the purpose of which is to prevent a threatened wrong or any further perpetration or injury or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time, and thus to protect property rights from further complication or injury until the issues can be determined after a full hearing.

Benson Hotel Corporation v. Woods, 168 F. 2d 694, 696, 697.

The province of a preliminary injunction is to preserve *pendente lite* the last actual peaceable non-contested status preceding a controversy.

Steinberg v. American Bantam Car Company, 76 Fed. Supp. 426, 441;

Automatic Dialing Corporation v. Maritime Quality Hardware Company, 78 Fed. Supp. 558, 560.

A court of equity may, in its discretion, grant an injunction, but a court of equity must exercise its discretion in such a manner as to safeguard the interest of both parties.

Corica v. Ragen, 140 F. 2d 496;

United States v. Cold Metal Process Company, 57 Fed. Supp. 317, 319, 320.

It should be noted that the dismissal of the action in the District Court was based solely on a belief by the trial court that it did not have jurisdiction over the subject matter; and the order dissolving the temporary restraining order was not based on discretion, but strictly on the question of jurisdiction. [Tr. of Rec. pp. 36, 38, 22-23.]

III.

A Federal Conviction Based on a Plea of Nolo Contendere Does Not Carry With It Any State Civil Penalties.

In the case of *In re Hallinan*, 43 Cal. 2d 243, the Supreme Court of California said on page 250:

> "Since Section 145, Subdivision (b), is a United States Statute, we must accept the interpretation given it by the United States Courts."

The State Medical Board is relying on a plea of *nolo contendere* to a Federal statute in seeking to discipline

Dr. Furnish. It therefore must depend on the Federal statute and Federal procedure.

A plea of *nolo contendere* is not open to the accused in all criminal prosecutions, and is allowable only under leave and acceptance by the Court. It is equivalent to a plea of guilty for the purposes of the case only, but is distinguishable in that it cannot be used against the defendant as an admission in any civil suit for the same act.

Tucker v. United States, 196 Fed. 260, 262 (C. C. A. 7th);

United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167, 170 (D. C. N. Y.).

A conviction based on a plea of *nolo contendere* cannot be used in any other case.

Mickler v. Fahs, 243 F. 2d 515, 517 (C. C. A. 5th);

United States v. Lair, 195 Fed. 47, 52 (C. C. A. 8th).

A plea of *nolo contendere* cannot be considered in disposing of issues in a civil action.

United States v. One Chevrolet, 91 Fed. Supp. 272, 275.

It should be noted that the learned trial judge at the time of imposing sentence stated ". . . unless they have professional grounds, certainly his license should not be revoked for this particular offense . . . technically speaking a plea of *nolo contendere* does not carry with it any of the civil penalties." [Tr. of Rec. p. 6.]

IV.

A 1951 Amendment Allegedly Making a Conviction of a Felony, Without Moral Turpitude, a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code Is an Ex Post Facto Law Where Applied to an Act Committed Prior to 1951.

The 1951 Amendment allegedly making a conviction of a felony, without moral turpitude, ground for disciplinary action against a physician and surgeon under Section 2383 of the Business and Professions Code is an *ex post facto* law where applied to an act committed prior to 1951.

The offenses to which the petitioner entered a plea of *nolo contendere* in the Federal Court involved income taxes for the years 1947 and 1948, with the returns for those years having been filed in 1948 and 1949.

At the time the tax returns were filed Section 2383 of the Business and Professions Code provided:

"The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct." It should be noted that there was no comma after the word "felony" in 1948 and 1949.

The comma was inserted after the word "felony" in Section 2383 of the Business and Professions Code in 1951.

Therefore the Board of Medical Examiners has applied to your petitioner the law as enacted in 1591, rather than the law as it was in 1947-1949.

Article 1, Section 10, of the United States Constitution, provides that no state shall "pass any bill of attainder or *ex post facto law*." The application of such an *ex post*

facto law amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

An *ex post facto law* within constitutional prohibition against the enactment of *ex post facto* laws, is one which makes a crime of an act which when committed was not a crime, or a law which increases the punishment for an act already committed. It has also been held that an *ex post facto law* is one which renders an act punishable in a manner in which it was not punishable when it was committed. It has been said the standard of determination in considering whether a given statute is *ex post facto* arises out of a comparison of the laws themselves and the rights which they confer or the obligations they impose.

Milliken v. McCauley, 20 Fed. Supp. 202, 205;
Fuller v. McCauley, 93 F. 2d 1004.

It has been said an ordinance is *ex post facto* if it imposes punishment for past conduct lawful at the time it was engaged in.

Garner v. Board of Public Works, City of Los Angeles, 341 U. S. 716, 721, 95 L. Ed. 1317, 1323.

An *ex post facto* law is one which renders a previously innocent action criminal, aggravates or increases the punishment, penalizes an innocent act while assuming to regulate civil rights and remedies, and deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage.

United States v. Forino & Garfinkel, 166 F. 2d 887, 890.

V.

A Federal Conviction of a Felony, Not Involving Moral Turpitude, Based on a Plea of Nolo Contendere, Is Not a Ground for Disciplinary Action Against a Physican and Surgeon Under Section 2383 of the California Business and Professions Code.

A conviction of a felony, not involving moral turpitude based on a plea of *nolo contendere*, is not ground for disciplinary action against a physician and surgeon under *Section 2383 of the Business and Professions Code.*

Section 2383 of the Business and Professions Code originally provided in effect that the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct subjecting a physician and surgeon to disciplinary action.

In 1951, Section 2383 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of the section providing for disciplinary action. At the time this amendment was enacted a comma was placed after the word "felony" in the first portion of the section so that it now reads: "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct."

It is significant, however, that in the amendment providing that a plea of *nolo contendere* shall be deemed to be a conviction, a comma was not placed after the word "felony."

Therefore, assuming for the sake of discussion that the Legislature had in mind that a conviction of a felony not involving moral turpitude should be a ground for discipli-

nary action, it is clear the Legislature did not have in mind that a plea of nolo contendere to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action.

It should be noted that *Section 6101 of the Business and Professions Code provides that a conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension of an attorney at law.*

When Section 6101 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* would be deemed to be a conviction the same as in Section 2383 of the Business and Professions Code, the Legislature did not insert a comma after the word "felony" in the first portion of Section 6101 of the Business and Professions Code to make a conviction of a felony not involving moral turpitude, a ground for disciplinary action.

The Board of Medical Examiners is faced with two horns of a dilemma: *Either an inadvertent error was made by the Legislature in inserting a comma after the word "felony" in the first portion of Section 2383 of the Business and Professions Code, since it did not see fit to do so in the case of an attorney at law, nor in the portion dealing with a plea of nolo contendere to a felony; or if the Legislature intended to make mere conviction of a felony in the case of a physician and surgeon ground for disciplinary action, then to be consistent we must come to the inescapable conclusion that the Legislature intended that in the case of a plea of nolo contendere it would be necessary that the felony involve moral turpitude in order to be deemed a conviction for the purpose of disciplinary action.*

The Supreme Court of California has specifically held, relating to lawyers, that a conviction of a felony is insuf-

ficient to justify disciplinary action unless there is a showing of moral turpitude.

In re Hallinan, 43 Cal. 2d 243.

The Supreme Court held in the Hallinan case that a nolo contendere plea is not equivalent to a plea of guilty, and that moral turpitude must be inherent in the commission of the offense to warrant disbarment. The Court said on page 247:

> ". . . In view of *Caminetti v. Imperial Mutual L. Ins. Co.*, 59 Cal. App. 2d 476, 490-492 (139 P. 2d 681), holding that a plea of nolo contendere is not the equivalent of a plea of guilty and cannot be used in another proceeding as an admission against the person so pleading, the State Bar was justified in concluding that such a plea was not the equivalent of a 'plea or verdict of guilty' within the meaning of Section 6101 of the Business and Professions Code."

And again on page 248, the Court said:

> ". . . Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in *In re Rothrock*, 16 Cal. 2d 449, 454 (106 P. 2d 907; 131 A. L. R. 226), an 'attorney's name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to the duties of the attorney's profession.' (See in re *McAllister*, *Supra*, 14 Cal. 2d 602, 603-604) (8). The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the crime of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the 'record

of conviction,' as the State Bar contends, the record of conviction is 'conclusive evidence' only when the crime itself necessarily involves moral turpitude."

And on page 250, the Court said:

"The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by Section 145, subdivision (b) of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder, without proof of that intent or other conduct evidencing moral turpitude, an attorney convicted of that crime cannot be summarily disbarred. (13) Since Section 145, subdivision (b) is a United States statute, we must accept the interpretation given it by the United States courts."

After analyzing the various cases in the United States Courts, the Court, in the *Hallinan* case, continued on page 252:

"The foregoing cases establish that fraud is not an essential element of the offense proscribed by Section 145, subdivision (b), that some measure of bad faith or evil intent is an essential element, but such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts does not necessarily involve moral turpitude."

In re Hallinan, 43 Cal. 2d 243.

We argue that it is difficult to understand how the Legislature could have meant one treatment for a lawyer and another for a doctor. It would be discriminatory to say the least.

VI.

It Was an Abuse of Discretion to Suspend the Appellant for One Year.

The punishment imposed by the decision of the Board of Medical Examiners, to-wit, suspension from the practice of medicine for one year, was so overly severe and unwarranted by the evidence as to constitute a prejudicial abuse of discretion.

It has been held that where the order or decision of an administrative agency is so severe it must be clearly supported by the findings, and the findings clearly supported by the weight of the evidence, or a prejudicial abuse of discretion has taken place:

Cooper v. State Board of Health (1951), 102 Cal. App. 2d 926, 932;

Sautter v. Contractors State License Board (1954), 124 Cal. App. 2d 149, 156, 157.

We have here the case of a distinguished physician and surgeon who has been practicing medicine for the past twenty years and who maintains an office at 5718 Hollywood Boulevard, Los Angeles, California. A voluminous file was built up by the many letters sent to the Court and considered by Judge Yankwich. To suspend such a man from practice for one year will destroy his reputation as a medical practitioner in the community, and will deprive his patients of his services during the period of suspension.

In view of all of the circumstances of this case, it clearly appears that this is not the type of case where a physician and surgeon should be deprived of his right to practice medicine, and it would be against the public interest to permit such a harsh penalty to be imposed where no moral turpitude was involved.

Conclusion.

The Federal Court is entitled to protect its finding that the case of Dr. Furnish does not warrant a suspension from the practice of medicine and that the pleas of *nolo contendere* do not carry any civil penalties.

The effort on the part of The Board of Medical Examiners to suspend the petitioner from practicing medicine is unwarranted when viewed in the light that the Board is endeavoring to punish the Doctor on the basis of a 1951 amendment being applied to acts committed in 1948 and 1949.

The suspension of a doctor from the practice of medicine is a most serious matter. Therefore, the statute on which the suspension is based should be strictly construed. Even taking the 1951 amendment at its face value, we find that in the case of a plea of *nolo contendere* a showing of moral turpitude is required. The Board agrees that there is no showing of moral turpitude in this case.

Accordingly, it is respectfully submitted that a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit reversing the judgment of the Circuit Court.

The issuance of a writ of certiorari should be granted as the Circuit Court has rendered a decision in conflict with the decisions of other Courts of Appeals, as set forth in this petition; the writ should also issue as important questions of law raised in this petition should be settled by this Court.

Respectfully submitted,

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Petitioner.

APPENDIX.

EXHIBIT "A".

Opinion of the United States Court of Appeals for the Ninth Circuit. (Decided June 21 1958—not reported).

United States Court of Appeals for the Ninth Circuit. Richard Douglas Furnish, Appellant, vs. The Board of Medical Examiners of the State of California, Appellee. No. 15,835.

Filed June 21, 1958.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, *Chief Judge;* FEE and BARNES, *Circuit Judges.*

BARNES, *Circuit Judge:*

Appellant, a physician and surgeon duly licensed for many years to practice his profession in California, in 1953 entered a plea of *nolo contendere* to two counts of violating Title 26 U. S. C. § 145(b) (I. R. C. 1939). The indictment had charged him in three counts of wilfully and knowingly attempting to defeat and evade his income tax in the years 1946, 1947 and 1948 by filing false and fraudulent returns. Appellant entered a not guilty plea to Count I and *nolo contendere* to Counts II and III. Count I was dismissed after sentence on the second and third counts. The sentence was a fine of $5,000 on each count. From the bench the judge who imposed the sentence commented on the facts of the case and indicated that he believed on a *nolo contendere* plea to an income tax evasion charge the State Medical Board would not revoke appellant's license to practice medicine.

The trial judge was mistaken in his clairvoyance. In 1955, the Board of Medical Examiners of the State of California made its order directing that appellant be suspended for a period of one year from the practice of medicine and surgery within that state. The order was based on the convictions represented by the pleas of *nolo contendere* hereinabove referred to.

In 1947 and 1948, when the tax evasions occurred, section 2383 of the California Business and Professions Code provided as follows:

"§ 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

In 1951, and before the indictment, plea or sentence, section 2383 of the California Business and Professions Code was amended to read as follows:

"§ 2383. Conviction of a crime in general. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of

sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment."

Appellant sought to set aside the Medical Board's order in state court procedure by writ of mandate. This was dismissed, and the dismissal upheld by the California District Court of Appeal.[1] Two petitions for rehearing were denied by that court,[2] as was a petition for hearing in the California Supreme Court.[3] A petition for writ of certiorari to the Supreme Court of the United States was denied,[4] as was a petition for rehearing.[5]

Having exhausted his state court remedies appellant filed this new action in the United States District Court for declaratory relief and an injunction, seeking to declare void the order of the Medical Board suspending appellant from medical practice and enjoining the Board temporarily and permanently from enforcing its order. An order to show cause and temporary restraining order was granted. The Board moved to dismiss for lack of jurisdiction. This motion was sutained, the complaint dismissed and the temporary restraining order dissolved. From that judgment

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[1]Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 308 P. 2d 924.

[2]*Id.*, 149 Cal. App. 2d 326, 332, 308 P. 2d 924, 309 P. 2d 493.

[3]*Id.*, 149 Cal. App. 2d 326, 333, 308 P. 2d 924, 929.

[4]*Id.*, 355 U. S. 827.

[5]*Id.*, 355 U. S. 879.

Meanwhile, appellant had moved in the United States District Court in which he had been sentenced to "correct" his sentence of May 4, 1953 so as to show it a "misdemeanor judgment." This motion was denied.

of dismissal and dissolution appellant here appeals, but before filing the notice of appeal, obtained an order restoring and granting the injunction restraining the enforcement of the Board's order pending the determination of this appeal.

The sole specification of error charged is the dismissal for lack of jurisdiction over the subject matter.

The federal courts have only the jurisdiction given to them by the Congress. It is well settled as a general principle that a decision of a state court cannot be reviewed by bill of equity in a federal court. American Surety Co. v. Baldwin, 1932, 287 U. S. 156, 164; Sexton v. Barry, 6 Cir., 1956, 233 F. 2d 220, 225; General Exporting Co. v. Star Transfer Line, 6 Cir., 1943, 136 F. 2d 329, 335; Lynch v. International Banking Corp., 9 Cir., 1929, 31 F. 2d 942, cert. den. 280 U. S. 571; Hall v. Ames, 1 Cir., 1911, 190 F. 138, 140; Furnald v. Glenn, 2 Cir., 1894, 64 F. 49, 54; Davega-City Radio v. Boland, S. D. N. Y. 1938, 23 F. Supp. 969, 970; Ritholz v. No. Carolina State Board, N. D. N. C., 1937, 18 F. Supp. 409, 413.

The Declaratory Judgment Act does not enlarge the jurisdiction of the federal district courts. As appellee aptly quotes:

"It is well settled that the Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly. It does not enlarge the jurisdiction of district courts. (Citing cases.)" Clark v. Memolo, D. C. Cir., 1949, 174 F. 2d 978, 980.

At page 981 of the same case, the court said:

"The Declaratory Judgment Act was designed to provide a remedy in a case or controversy while there is still opportunity for peaceful judicial settlement. It was the primary

purpose of the act to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated."

The district court "may not grant an injunction to stay proceedings in a state court, except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

Recognizing this, appellant first states he seeks an injunction against the enforcement of the Board's order, and not against a judgment of a state court. But the Board of Medical Examiners here, and in the state courts, was a party litigant, and the restriction of the United States Code cannot be avoided by seeking to enjoin a litigant, rather than the state court itself. Hill v. Martin, 1935, 296 U. S. 393, 403; H. J. Heinz Co. v. Owens, 9 Cir., 1951, 189 F. 2d 505, 507.

Appellant next seeks to escape the fiat of 28 U. S. C. § 2283 by slipping through either of its second and third exceptions—"necessary aid of jurisdiction" or "protection or effectuation of its judgments." Appellant states this question as follows:

"Has the State Board of Medical Examiners committed an intrusion into the processes of the Federal Court by attaching a penalty to a conviction based on a plea of nolo contendere, on which the Federal Court may act?"

In discussing this point, appellant in his brief states:

"The Federal Court in passing judgment on the appellant at the time his criminal income tax case was disposed of *found* that his license should not be revoked for the particular offense; it also *found* that the plea of nolo contendere did not carry any civil penalties. [Tr. of R. p. 6.]

The Court could not have used a stronger language in endeavoring to protect appellant's right to practice medicine." [Emphasis added.]

If we use the word "found" in its non-legal sense, the transcript of the trial court's statement (at the time of sentence) indicates that the statement made in appellant's opening brief cannot be criticized.[6] If we consider the word "found" in its legal sense, it can be. But certainly we find no basis for the statement in appellant's reply brief that there was "*a finding* of the Federal District Judge that a plea of nolo contendere does not carry with it any civil penalties." No such "finding" was made. The trial judge expressed the informal thought that the Medical Board would not revoke appellant's license and expressed the belief that "technically speaking a plea of nolo contendere does not carry with it any of the civil penalties."

His statement from the bench was not part of the judgment or decree, and hence the several cases cited by appellant that "every Court has inherent power to enforce its judgments and decrees" state good law, but law that is here inapplicable.

Further, the judge below was wrong, both in his anticipation of what the Board of Medical Examiners would or would not do, and in what penalty a plea of *nolo contendere*

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[6]By the Court:

"I think, on a plea of nolo contendere they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of nolo contendere does not carry with it any of the civil penalties." [Reporter's Transcript of Proceedings at time of sentence of Richard D. Furnish on pleas of *nolo contendere* to two counts of income tax evasion, May 4, 1953, page 7.]

might carry. The first is proved by the Board's subsequent action in suspending appellant's license: the second by the language of the California Business and Professions Code then in effect and which had been in effect for almost twenty months which read (in material part, and transposed):

". . . A conviction following a plea of nolo contendere made to a charge of a felony . . . is deemed to be a conviction . . . constituting unprofessional conduct within the meaning of this Chapter."

Thus, we conclude the All Writs section (28 U. S. C. § 1651) is not available in aid of jurisdiction or to protect, or effectuate, a judgment as set forth in 28 U. S. C. § 2283.

Further, while the statute provides that "the record of (such) conviction is conclusive evidence of such unprofessional conduct," the Board of Medical Examiners is not limited by the sentence pronounced (Brainard v. Board of Medical Examiners, 1945, 68 Cal. App. 2d 591, 157 P. 2d 7), but is entitled to hear and consider evidence as to all surrounding circumstances. Obviously, the district court in determining a particular income tax evasion case, could not require as part of its judgment, that the Board of Medical Examiners of the State of California follow its wishes or advice, even had the district court purported to so express its wishes or advice which it here did not do.

In the state courts, the Board of Medical Examiners took the position that conviction by plea of *nolo contendere* to a felony charge was sufficient grounds for disciplinary action, without regard to whether the offense involved moral turpitude. A stipulation has been presented to us on this appeal stating that the Board in its action against

Dr. Furnish "did not seek to discipline the said appellant for the conviction of an offense involving moral turpitude."

The state courts upheld the Board's position that conviction of a felony, irrespective of whether an offense involving moral turpitude was involved, lay within the Board's power, and this, even though the 1951 Amendment to §2283 was enacted after appellant's commission of the offenses on which the felony convictions were predicated, but before the felony convictions were had. The state court of appeal held the constitutional proscription against *ex post facto* laws was no bar to the disciplinary action under such factual circumstances, and this holding was approved by the Supreme Court of California, and review was denied by the Supreme Court of the United States.

We conclude the United States District Court was correct in deciding that it had no jurisdiction in this matter.

This disposition makes it unnecessary for us to consider appellant's fourth point presented—whether conviction of a felony not involving moral turpitude based on a plea of *nolo contendere* is a ground for disciplinary action against a physician and surgeon under § 2383 of the California Business and Professions Code; and his *fifth*—whether it was an abuse of discretion to suspend the appellant for one year.

The judgment of dismissal is affirmed, and the matter remanded to the District Court with instructions to terminate the order restoring the original injunction enjoining and restraining the appellee from enforcing its order of suspension made by the Board of Medical Examiners of the State of California on November 10, 1955.

(Endorsed:) Opinion. Filed June 21, 1958.

Paul P. O'Brien, Clerk.

EXHIBIT "B".

Opinion of the District Court of Appeal of the State of California Affirming Judgment. (149 Cal. App. 2d 326).

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Richard Douglas Furnish, M. D., Petitioner and Appellant, vs. The Board of Medical Examiners of The State of California, Defendant and Respondent. Civil No. 21721.

Filed Mar. 20, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County, John J. Ford, Judge.

For Appellant: Murray M. Chotiner and Russell E. Parsons.

For Respondent: Edmund G. Brown, Attorney General, Howard S. Goldin, Deputy Attorney General.

This is an appeal from a judgment of dismissal after sustaining a demurrer without leave to amend.

An accusation was filed with the Board of Medical Examiners of the State of California, hereinafter referred to as the "Board", on July 21, 1954, wherein it was alleged that Richard Douglas Furnish, hereinafter referred to as the "Doctor," has been guilty of unprofessional conduct contrary to the provisions of section 2383 of the Business and Professions Code, in that on or about May 4, 1953, in the United States District Court he was convicted of two felonies and criminal offenses involving moral turpitude, that is, two counts of violation of Title 26 U. S. C., section 145 (b) (1939 Code), in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the

United States of America for the calendar years 1947 and 1948, and each of said years.[1] A hearing was held on February 11, 1955, before a hearing officer assigned by the Board, at which time there was introduced into evidence a certified copy of the record of conviction in the case in the District Court, establishing that the Doctor, on May 4, 1953, was convicted following his pleas of *nolo contendere* of two counts of violation of Title 26 U. S. C., section 145 (b) (Income Tax Evasion) for the calendar years of 1947 and 1948. It was conceded at the hearing that there was no evidence to establish that the convictions involved moral turpitude.

The hearing officer in his proposed decision found that the Doctor had been convicted of the two felonies and proposed a one-year suspension of his license to practice medicine and that the execution of such a penalty be suspended for three years on specified terms and conditions. The Board did not adopt the proposed decision, notified the parties accordingly and afforded to them an opportunity to file written arguments with the Board. The Board then determined the case and found that the Doctor had been

[1] The accusation against appellant, Richard Douglas [illegible] M. D. in paragraph III thereof, charged:

"That the respondent has been guilty of unprofessional conduct contrary to the provisions of Section 2383 of the Business and Professions Code of the State of California, in that

"That on or about May 4, 1953, in a proceeding then pending in the United States District Court for the Southern District of California, Central Division, entitled 'United States of America vs Richard Douglas Furnish (charged as Richard Douglas Furnish),' No. 22,734 Criminal, the respondent was convicted of felonies and criminal offenses involving moral turpitude, to wit, two counts of violation of Title 26 U. S. C. Section [illegible] in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of said years."

convicted of the felonies in question and ordered that his license be suspended for one year. The Doctor petitioned for a rehearing, which was denied by the Board.

The Doctor then sought a writ of mandamus in the superior court in Los Angeles county, the purpose of which was to set aside the order of the Board. The administrative record was incorporated in the Doctor's first amended petition for a writ of mandate. The demurrer of the Board to the petition was sustained without leave to amend and a judgment of dismissal was thereafter made and entered. This appeal is from the judgment of dismissal.

The Doctor contends that a conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere*, is not a ground for disciplinary action against a physician and surgeon under section 2383 of the Business and Professions Code. The Board asserts, in this connection, that a conviction of a felony and a conviction of a criminal offense involving moral turpitude are separate, distinct and different grounds for disciplinary action. Further, that by the statute, a conviction following a plea of *nolo contendere* to a charge of a felony, is expressly deemed to be a conviction for the purposes with which we are here concerned. The Doctor also contends that the convictions do not constitute felonies under the California law.

The Doctor further argues that the statute in question is an *ex post facto* law as to him, in that the offenses were committed in 1947 and 1948, and it was the 1951 amendment to the law which was applied to him. He also claims that it was an abuse of discretion for the Board to suspend his license to practice medicine for one year.

Section 2383 of the Business and Professions Code is set forth in a footnote hereto.[2] When the section was added to the statutes in 1937, it consisted of the first two sentences of the section as now constituted, excepting that there was no comma following the word "felony", and no comma following the word "turpitude" in the first sentence.

In 1951, the section was amended by adding the commas to the first sentence and the balance of the section.

Title 26, U. S. C. section 145(b) (1939 Code), reads in part as set forth in the footnote hereto.[3]

In our opinion, the Doctor failed to state a cause of action warranting the issuance of a writ of mandate. The use of the disjunctive in the section in question, that is, "The conviction of a felony, *or* of any offense involving

[2] "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment." (Amended by Stats. 1951, ch. 792, Sec. 1.)

[3] "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

moral turpitude, constitutes unprofessional conduct" (emphasis added)—makes it abundantly clear that the legislature intended that the *conviction of a felony* in and of itself, without any qualifications, constitutes unprofessional conduct. It is also clear that "any offense involving moral turpitude, constitutes unprofessional conduct"—and such conduct does not necessarily have to be a felony. Further, for the purposes of this proceeding, the record of conviction is conclusive evidence of the questioned conduct, and by the very terms of the section itself, as "plea of *nolo contendere* made to a charge of a felony or *of* any offense involving moral turpitude" (emphasis added)—is deemed to be a conviction within the meaning of the section. (Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 686.)

Under the federal law it is the punishment which the statute authorizes which determines whether a crime is a felony or a misdemeanor. (Cartwright v. United States, 146 F. 2d 133, 135.)

For disciplinary purposes the law of the jurisdiction where the crime was committed determines the character of the offense as a felony or a misdemeanor. (Caminetti v. Imperial Mut. L. Ins. Co., 59 Cal. App. 2d 476, 490; Karrell v. Watson, 116 Cal. App. 2d 769, 771, 774; Murrill v. State Board of Accountancy, 97 Cal. App. 2d 709, 710, 712.)

The statute here clearly intended to make the conviction of a felony in the federal courts grounds for disciplinary action. The use of the words "*nolo contendere*" are, for all intents and purposes, meaningless, unless the legislature so intended, for there is no such plea in the California state courts, and there is such a plea in the federal courts. Had the legislature not so intended, it could, and undoubtedly

would have used language such as is contained in sections 2391.5 and 2390 of the Business and Professions Code, where the restrictive term "statutes of this State" is used.

The contention that the 1951 amendment is an *ex post facto* law as to the Doctor is without merit. It is the law that "the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish no party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed." (Watson *et al.* v. Mercer *et ux.*, 8 L. Ed. 876, 884.) The Supreme Court of this State, in Foster v. Police Commissioners, 102 Cal. 483, in substance, held to the same effect and further said (at page 492), "(t)hough not an *ex post facto* law, it is retrospective insofar as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before."

The revocation or suspension of a license is not penal, but rather, the legislature has provided for such to protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from ignorance or incompetency or a lack of honesty and integrity.

The Doctor in this case was convicted in 1953, and the suspension was not based upon substantive acts which occurred in 1947 and 1948. The disciplinary action is predicated solely upon the two felony convictions in 1953.

almost two years after the law was amended and was in full force and effect. (Karrell v. Watson, *supra*, 116 Cal. App. 2d 769, 774.)

It is urged that in the case of *In re* Hallinan, 43 Cal. 2d 243, which involved an attorney at law, the Supreme Court specifically held that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude. Counsel state that it is difficult for the Doctor to understand how the doctor should be treated one way and the attorney another. Suffice it to say that the law is different as to each of them and that the legislature amended the section having to do with the doctor in 1951, as heretofore set forth, and it did not amend section 6101 of the Business and Professions Code, which has to do with the attorney.

The Hallinan case, heretofore referred to, does not hold that a conviction following a plea of *nolo contendere* made to a charge of a felony may not be declared to be grounds for disciplinary action by statute. Under the State Bar Act a conviction without moral turpitude is insufficient for summary disciplinary proceedings, and, at the time of the first Hallinan decision, the *nolo contendere* plea was not designated as a conviction by statute. Under the Medical Practice Act, a hearing is required, a conviction of a felony is an independent ground for disciplinary action without regard to whether moral turpitude was in fact involved, and a conviction following a *nolo contendere* plea was expressly defined as a conviction for disciplinary purposes. In *In re* Hallinan, 48 A. C. 50, the court held that the evidence disclosed that Hallinan had intentionally and for the purpose of personal gain filed false income tax returns and ordered that he be suspended from the practice of law in the state for three years.

The remaining contention of the Doctor is that it was an abuse of discretion to suspend the Doctor's license for one year. The extent of the penalty within the Board's discretion is for the Board to determine. The penalty imposed against the Doctor was well within the power of the Board. (Section 2372, Business and Professions Code; 2 Cal. Jur. 2d, Administrative Law, p. 393; Fuller v. Board of Medical Examiners, 14 Cal. App. 2d 734, 737-738; King v. Board of Medical Examiners, 65 Cal. App. 2d 644, 652; Painless Parker v. Board of Dental Exam., 216 Cal. 285, 300; Black v. State Personnel Board, 136 Cal. App. 2d 904, 912; Schneider v. Civil Service Com., 137 Cal. App. 2d 277, 285; Newman v. Board of Civil Service Comrs., 140 Cal. App. 2d 907, 912; Olson v. Watson, 143 A. C. A. 381, 389.)

The judgment is affirmed.

FOURT, *J.*

We concur:

WHITE, *P. J.*,

DORAN, *J.*

EXHIBIT "C".

Opinion of the District Court of Appeal of the State of California Denying Application for Rehearing on Court's Motion (149 Cal. App. 2d 326).

In the District Court of Appeal of the State of California, Second Appellate District.

Richard D. Furnish, M. D., Appellant; vs. Board of Medical Examiners, Respondent. Civil No. 2172

Filed April 19, 1957.

THE COURT.—On March 20, 1957, this court filed its decision affirming the order of the superior court in the above entitled action.

On April 3, 1957, a petition for rehearing was filed by the appellant, within the time provided for by law; the petition for rehearing was denied on April 9, 1957. Appellant has filed in the Supreme Court a petition for hearing.

On April 10, 1957, appellant made an application to this court to grant a rehearing on its own motion under Rule 27, Rules on Appeal.

Appellant's present application is basically grounded on the following allegations:

"Petitioner intends to file before the Honorable Leon Yankwich, Judge of the Federal District Court a motion to correct the sentence heretofore imposed against the petitioner on his plea of *nolo contendere* to two counts of violating Section 145 (b) of the Internal Revenue Code to show that he was convicted of violating Section 3616(a) of the Internal Revenue Code, a misdemeanor.

"Said motion will be made under the authority of Section 2255 of Title 28 of the United States Code;

"The case of Griffin v. United States (1949 C. C. A.), 173 F. 2d 909, holds that even though a sentence is served but if invalid and creates an unjust result the Court will not ignore error:

"The basis of the motion to correct the sentence is that the offense of violating Section 145 (b) of the Internal Revenue Code, a felony, is, in effect, the same as violating Section 3616(a), of the Internal Revenue Code, a misdemeanor."

Upon the authority and for the reasons stated in *Ex Parte* Berkoff, 65 F. Supp. 976, 979, 981, and the holding in Bowles v. United States, 73 F. 2d 772, 776 (certiorari denied. 294 U. S. 710 (55 S. Ct. 506, 79 L. Ed. 1245)), the application is denied.

IN THE

Supreme Court of the United States

October Term, 1958

No. 363

[illegible] Douglas Furnish, M.D.,

Petitioner and Appellant,

vs.

The Board of Medical Examiners of the State of California,

Defendant and Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Murray M. Chotiner and
Russell E. Parsons,
2029 North Hamilton Drive,
Beverly Hills, California,
Attorneys for Petitioner and Appellant,
Douglas Furnish, M.D.

The Myers Legal Press, Inc., Los Angeles, Phone MA 5-9231

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 393.

RICHARD DOUGLAS FURNISH, M.D.,

Petitioner and Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Richard Douglas Furnish, M.D., prays that a rehearing be granted and that petitioner's Petition for a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 21, 1958, whereby the judgment dismissing the action brought by petitioner for declaratory relief and injunction in the United States District Court against The Board of Medical Examiners of the State of California to set aside its decision suspending petitioner from the practice of medicine for one year was affirmed. Petition for Rehearing was denied on August 7, 1958 [Tr. of Rec. pp. 60-61].

Petition for Writ of Certiorari was denied on November 10, 1958.

Statement of Case.

Petitioner filed a complaint in the United States District Court, Southern District of California, Central Division No. 1305-57-T, against The Board of Medical Examiners of the State of California, seeking declaratory relief and injunction to restrain the Board from suspending the appellant from the practice of medicine in the State of California for one year and to declare the rights of the petitioner [Tr. of Rec. pp. 3-17].

The Honorable Ernest A. Tolin, United States District Judge, issued an order to show cause and temporary restraining order, restraining the Board from suspending the petitioner pending the hearing of the order to show cause [Tr. of Rec. pp. 17-18].

On motion of the respondent the District Court ordered the complaint dismissed for lack of jurisdiction [Tr. of Rec. pp. 19-20, 22-23].

On motion of the petitioner the District Court restored and granted an injunction during the pendency of an appeal, enjoining and restraining the Board from enforcing the order suspending the petitioner from practicing medicine and surgery in the State of California [Tr. of Rec. pp. 20-21].

An appeal was taken by appellant to the United States Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the judgment of the District Court dismissing appellant's petition for lack of jurisdiction, with instructions to terminate the order restoring the original injunction enjoining and restraining The Board of Medi-

cal Examiners of the State of California from enforcing its order of suspension. Appellant's petition for rehearing was denied by the Circuit Court [Tr. of Rec. pp. 60-61].

A Petition for Writ of Certiorari was filed in the Supreme Court of the United States and was denied on November 10, 1958.

Statement of Facts.

Petitioner, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Tr. of Rec. p. 3], was convicted on a plea of *nolo contendere* in the United States District Court for the Southern District of California, Ceneral Division, of two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income taxes for the years 1947 and 1948 [Tr. of Rec. pp. 4-5].

The judgment of the Federal Court was that the petitioner be fined the sum of $5,000 on each of the two counts [Tr. of Rec. p. 6].

Thereafter, The Board of Medical Examiners of the State of California on or about November 10, 1955, made an order directing that petitioner be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order was based on the convictions on the pleas of *nolo contendere* hereinabove referred to [Tr. of Rec. pp. 3-4].

That the order of suspension was made after the Board's Hearing Officer proposed that a suspension of one year be stayed, and petitioner placed on probation for a period of three years. The recommendation of the

Hearing Officer was overruled by the Board [Tr. of Rec. p. 4].

The Board of Medical Examiners has stipulated that it did not seek to discipline the petitioner for the conviction of an offense involving moral turpitude. (Stip.)

Question Presented.

Is a conviction in the Federal Court of a felony on a plea of *nolo contendere* ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code if the "felony" is only a misdemeanor under California law and no showing of moral turpitude has been made?

Statutes Involved.

Section 2383 of the Califoria Business and Professions Code provides:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaing of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing

such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment."

Section 17 of the California Penal Code provides:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

Section 19401 of the California Revenue and Taxation Code provides:

"Any person who, with or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any information required under this part, or who, with or without such intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, is liable to a penalty of not more than one thousand dollars ($1,000). The penalty shall be recovered by the Attorney General or the counsel for the Franchise Tax Board in the name of the people by action in any court of competent jurisdiction.

"The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed one thousand dollars ($1,000) or be imprisoned not to exceed one year, or both, at the discretion of the court."

Section 19405 of the California Revenue and Taxation Code provides:

"(a) Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand dollars ($2,000) or imprisoned in the state prison not more than five years, or both.

(b) The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."

Title 26, United States Code, Section 145(b), provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

ARGUMENT.

A Conviction of a Felony in the Federal Court on a Plea of Nolo Contendere Is Not a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code When the "Felony" Is a Misdemeanor Under California Law, and No Showing of Moral Turpitude Has Been Made.

Section 19401 of the California Revenue and Taxation Code makes it a misdemeanor to make a false or fraudulent return required by the State Franchise Tax Board.

Section 19405 of the California Revenue and Taxation Code states, in effect that any person who wilfully makes and subscribes a return which is verified and which he does not believe to be true and correct as to every material matter shall be guilty of a felony and upon conviction may be fined or imprisoned in the state prison.

Section 17 of the California Penal Code provides in effect that when a crime is punishable by imprisonment in a state prison and is also punishable by fine or imprisonment in the county jail, it shall be deemed a misdemeanor for all purposes, if a judgment is imposed other than imprisonment in a state prison.

> "As to a crime which may be either a misdemeanor or a felony, depending upon punishment imposed therefor, it is the punishment specified by the sentence which determines the character of the crime for all purposes."
>
> *People v. Hamilton*, 33 Cal. 2d 45, 198 P. 2d 873.

The sentence imposed on the petitioner for the Federal income tax violation was a fine in the sum of $5,000 on each of two counts [Tr. of Rec. p. 6].

Section 2383 of the California Business and Professions Code calls for discipinary action when the conviction is for a felony, or of any offense involving moral turpitude.

No contention has been made by the California Board of Medical Examiners of moral turpitude being involved and, in fact, it was stipulated that The Board of Medical Examiners did not seek to discipline the petitioner for the conviction of an offense involving moral turpitude. This stipulation is on file with the records of the United States Court of Appeals for the Ninth Circuit.

Since the judgment imposed was only a fine, under California law it became a misdemeanor. The Board of Medical Examiners seeks to discipline the petitioner for what was a felony in the Federal Court but which, under applicable California law would only be a misdemeanor.

A rehearing should be granted, as substantial grounds for the issuance of certiorari are presented herein which have not been previously presented to this Court.

Furthermore, intervening circumstances of a substantial or controlling effect have occurred in that there has been no determination in this matter whether the conviction of a felony in the Federal Court, amounting to only a misdemeanor under California law, may be used for disciplinary action.

Wherefore, it is respectfully urged that the Petition for Rehearing should be granted so that the case may be remanded to the United States Court of Appeals for the Ninth Circuit, for the reasons stated.

Respectfully submitted,

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Petitioner Richard Douglas Furnish, M.D.

Certificate of Counsel.

Murray M. Chotiner does hereby certify:

1. That he is one of counsel for the petitioner;

2. That the Petition for Rehearing is presented in good faith and not for delay; and

3. That the petition is restricted to the grounds hereinabove stated;

MURRAY M. CHOTINER.